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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*,

v.

BLACK BALL FREIGHT SERVICE, *et al.*, *Appellees*.

No. 382

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

BLACK BALL FREIGHT SERVICE, *et al.*, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

MOTION TO AFFIRM

In this motion, four of the motor carrier appellees, pursuant to Rule 16 of the Revised Rules of this Court, ask that the judgment of the District Court be affirmed on the

ground that the questions presented are so insubstantial as not to merit further argument.[1]

Questions Presented

The questions presented relate to the procedures employed by appellant the Interstate Commerce Commission in granting temporary operating authority to appellant American Farm Lines. The governing statute authorizes the Commission to grant such authority where there is an "immediate and urgent need" for a service and "no [existing] carrier service [is] capable of meeting such need." 49 U.S.C. § 310a(a). The governing regulations specify that an application for such authority "must" be accompanied by supporting statements of shippers; that those statements "must" contain a variety of data relating to the statutory standards, including particulars as to any efforts made by the shippers to obtain service from existing carriers; and that carriers contesting the application may submit written evidence in opposition. 49 C.F.R. Part 1131. In this case, the supporting shipper did not supply the specified particulars respecting its efforts to obtain service from existing carriers, although those carriers averred that in fact their service to the shipper had been unexceptionable. Nonetheless, the Commission granted the application. After the lower court temporarily stayed the Commission's order, the Commission, without permission of the court, reopened the proceeding, took additional evidence, and again granted the authority, even though the shipper again did not furnish the missing data. The questions are:

1. Were the Commission's orders infirm because of

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[1] The four appellees are Consolidated Freightways Corporation of Delaware, Riss & Company, Inc., Yellow Freight Service, and Tri-State Motor Transit Co. We understand that all other appellees except the United States will also file motions to affirm.

the Commission's failure to follow its own regulations?

2. Alternatively, should the Commission's action have been set aside because the Commission had not secured leave of court to reopen the proceeding?[2]

Statement

As the jurisdictional statements indicate, this controversy arose out of an attempt by appellant American Farm Lines ("AFL") to escape the impact of recent legislation and court orders (AFL J.S. pp. 6-7; ICC J.S. p. 6).[3] The legislation, which restricted the transportation that agricultural motor carrier cooperatives could perform for non-members while still maintaining their exemption from regulation, was based upon the Congress' finding that abuses by such carriers of their exempt status had worked serious damage to regulated carriers.[4] The court orders, which were entered by federal district court in Oklahoma against AFL at the behest of both regulated carriers and the Interstate Commerce Commission, enjoined AFL from providing as an

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[2] The record would have supported yet a third ground for setting aside the Commission's order, namely, that the Commission's action, measured against the evidence, exceeded its statutory authority. The lower court quite properly did not reach this issue—though it hinted strongly it would have decided it against the Commission (AFL J.S., App. A, pp. 11a-12a). However, were this Court to note probable jurisdiction, we would ask the Court to consider this third issue as an alternative ground for affirming the judgment below.

[3] We cite the Jurisdictional Statement in No. 369 as "AFL J.S.," and the one in No. 382 as "ICC J.S."

[4] See S. Rep. No. 1152, 90th Cong., 2d Sess. 2, 6. The basic exemption is set forth in 49 U.S.C. § 303(b)(5). The 1968 amendment to that section provides that such a cooperative may transport only such non-member traffic as is "necessary and incidental" to its service for members, and that in no event shall its non-member traffic exceed 15% of its overall interstate traffic. 82 Stat. 448. The "necessary and incidental" restriction had been judicially imposed prior to the amendment as a gloss upon the former legislation. *Northwest Agricultural Cooperative Ass'n v. ICC*, 350 F.2d 252 (9th Cir. 1965), *cert. denied*, 383 U.S. 1011.

exempt carrier various types of transportation service for the Government because such service was unlawful even prior to the legislative amendment. Since the filing of the jurisdictional statements, not only have these orders been affirmed,[5] but also the Oklahoma district court has held AFL to have been in deliberate contempt of the orders and has levied a fine of over $70,000.[6] In the contempt proceeding, as in the original actions, the Commission joined the regulated motor carriers in seeking court action against AFL.

Faced with these legislative and judicial restraints upon its burgeoning Government business, AFL filed applications for both permanent and temporary authority respecting that business. The application for permanent authority is still pending; the Commission's action on the temporary authority application gave rise to the litigation now before this Court.[7] The facts relevant to the lower court's disposition of the litigation are as follows:

1. *The Statute and Regulations.*

The Commission, of course, was called upon to measure the temporary authority application against the relevant statutory standards as implemented by the Commission's

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[5] *Munitions Carriers Conference, Inc.* v. *American Farm Lines*, 1969 CCH Fed. Car. Cas. ¶ 82,122 (10th Cir., July 30, 1969), reproduced as Appendix D to the Motion of Railroad Appellees to Affirm.

[6] The court's opinion is reproduced as Appendix B to the Motion of Railroad Appellees to Affirm.

[7] We do not mean to suggest agreement with AFL's evident belief that, if it secured such temporary or permanent authority, it could continue simultaneously (1) to operate as an exempt carrier, and (2) to carry Government freight without regard to the section 303(b)(5) restrictions. See note 4 *supra*. As that provision is worded, the Congress did not contemplate such a hybrid operation, partly exempt and partly regulated. Accordingly, in our view if AFL's application for permanent authority is granted—or if this Court reverses the lower court's judgment respecting temporary authority—AFL will have to choose between regulated and exempt status as to all of its traffic. That question, however, is not presented on this appeal.

regulations. Before describing what the Commission did, therefore, we first outline the framework of statutory and regulatory provisions.

The statute authorizes the Commission in unusual circumstances to grant temporary motor carrier authority "without hearings or other proceedings." This departure from the procedure normally associated with applications for operating authority is permitted only "[t]o enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need . . . ." 49 U.S.C. § 310a(a). The statutory language indicates that the Congress had in mind emergency situations involving extraordinary transportation problems.[8] So does the legislative history. Thus, the Commission, in recommending the legislation, illustrated the need by referring to the "emergencies" created by "[t]he bringing in of oil wells in a new field and conditions created by a flood or other calamitous visitation . . . ."[9]

Moreover, the Commission assured the Congress that, even with respect to emergency situations, it "recognized that care would be necessary to protect the legitimate interests of other carriers . . . ."[10] The comprehensive body of regulations promulgated by the Commission to govern temporary authority applications is aptly designed to afford that protection. Those rules have the following salient features:

First, while recognizing that in some instances the "emergencies" would be so "immediate and actual" that there would be no time to publish notice of the application,[11] the

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[8] See *Pan-Atlantic S.S. Corp.* v. *Atlantic Coast Line R.R.*, 353 U.S. 436, 441 (Burton, J., dissenting).

[9] S. Doc. No. 154, 75th Cong., 3d Sess. 2-3.

[10] *Ibid.*

[11] 49 C.F.R. §§ 1131.2(d), 1131.4(b)(3).

Commission provided that in the absence of such circumstances there should be the opportunity for a limited adversarial proceeding based upon written evidence and argument. Thus, in the ordinary temporary authority case—such as the case at bar—the regulations require that notice be published and that "interested persons who can and will provide all or any part of the proposed service" be accorded the opportunity to file written protests. 49 C.F.R. § 1131.3 (a)(1), (2).

Second, to insure that those protests in rebuttal of the applicant's case can be framed with specificity, the regulations require that the submissions in support of the application provide a variety of detailed data pertinent to the statutory standards. Thus, each application must be accompanied by a supporting statement of a shipper, and this statement must set forth "at least" eleven items of particularized information that bear upon the immediacy and urgency of his need and the inadequacy of existing service. 49 C.F.R. § 1131.2(c). These regulations are set out in full in Appendix A hereto.

Third, among the categories of required information are those directly involved in this litigation:

> (8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> (9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

The information required by these subparagraphs goes directly to whether existing carriers can perform the needed service, and indirectly to the urgency and immediacy of the need. Thus, the shipper must recount in full the experiences

that have led him to conclude that existing service is inadequate. This disclosure may permit the protestants to show that the shipper's efforts have been only superficial or that the inadequacies have been insubstantial when measured against the shipper's reasonable needs. Or, since the required information relates to specific instances of allegedly inadequate service by named carriers, the disclosure may enable those carriers to dispute the allegations or mitigate their impact.

2. *Proceedings Before the Commission.*

AFL's application for temporary authority, filed on May 17, 1968, sought authority to transport general commodities for the United States between all points in a nine-state middlewestern and southern area, on the one hand, and a five-state western area on the other (R. 1716). While the application related to all Government traffic, the only supporting statement was that of the Department of Defense ("DOD"). That statement characterized AFL's service as "extremely desirable" because "[t]he services of this company have afforded the Department of Defense a meaningful measure, under practical conditions, of carrier capability in general."[12] DOD did not aver, however, that existing service was inadequate. The statement was thus consistent with two earlier letters—one to AFL and the other addressed to appellee Riss & Co. only five days prior to the date of the supporting letter—in which DOD had asserted that, while it would like to retain AFL's service, it was "not in a position to state that there would be insufficient or inadequate service without American Farm Lines."[13]

Eighty protests were filed on behalf of well over 100 motor and rail carriers, each of which asserted that it could

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[12] The letter is set forth as Appendix B to the Motion to Affirm of the other motor carrier appellees.

[13] The letters are set forth as Appendices B and C hereto.

provide some part of the service in question. The protestants also challenged DOD's statement as not complying with the regulations, said that they could not respond to the statement's generalities except with generalities, and asserted that DOD had not complained that their service had been inadequate.

The Temporary Authorities Board, on July 12, 1968, denied the application on the ground that the "applicant has not established that there exists an immediate and urgent need for any of the service proposed" (R. 1729). However, on September 3, 1968, Division 1, acting as an appellate division on AFL's petition for reconsideration, granted the temporary authority (AFL J.S., App. C).

Several protestants filed petitions for reconsideration and motions to stay the order, but the Commission denied the motions to stay (R. 1732-35) and AFL commenced operations under the temporary authority. A number of protestants thereupon brought suit in the lower court and sought a stay. After a hearing, Judge Boldt issued the stay on the basis of a preliminary showing respecting the Commission's failure to enforce its regulations relating to the DOD statement.

The Commission, on its own motion, subsequently reopened the proceedings "for the purpose of receiving a verified statement from the Department of Defense . . . ." It directed that the statement "specify the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers . . . ." To assure the protestants an "opportunity to reply" to this new evidence, the Commission also invited the submission of verified statements in rebuttal. (AFL J.S., App. F).[14]

[14] After it had reopened the proceeding, the Commission filed a motion in the lower court seeking a stay pending the outcome of the reopened proceeding. Commission counsel never noticed the motion for hearing,

Upon the reopening, AFL submitted a DOD statement authored by a transportation official, Vincent F. Caputo. Since the central issue in this case is whether the Caputo statement conformed to the regulations, we discuss its contents below. First, however, we complete the chronology of the Commission and court proceedings.

The protesting carriers objected again that the Caputo statement failed to comply with the regulations and that its claims of service inadequacies were so general that responses could be framed only in like generalities. Nonetheless, within the limitations imposed by the deficiencies of the Caputo statement, protestants adduced a considerable body of evidence (R. 3796 *et seq.*). Taken together, their submissions made out a case the pertinent aspects of which may be summarized as follows: First, between many of the points and as to many of the commodities in question, existing carriers did provide single-line, direct route, and/or team driver service—the sort of service DOD said it wanted to continue receiving from AFL. Second, even where that was not true, existing carriers provided a wholly adequate service. In that connection, protestants asserted that single-line, direct route service using team drivers is not necessarily superior to joint-line, regular route, single driver service, but that rather the quality of service depends upon the practices of the carriers involved. And, while disabled from rebutting with particularity the general Caputo allegations respecting service deficiencies, protestants did assert that their records showed no failure to deliver DOD traffic on time and no complaints by DOD.

Notwithstanding the lower court's preliminary determination that the original DOD statement had not complied

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however, and therefore it was never considered by the lower court. Since the Commission had not secured judicial approval of the reopening, a number of protestants petitioned the Commission to vacate its order. Those petitions were never ruled upon.

with the Commission's regulations, and despite the renewal of that claim by protestants respecting DOD's second statement, the Commission on December 19, 1968, again granted the application without even mentioning the issue. (AFL J.S., App. E). The protestants for the second time went to court.

3. *Proceedings in the District Court.*

On January 6, 1969, Judge Boldt temporarily stayed the Commission's second order. The three-judge court entered its final judgment on March 26, 1969, holding the orders null and void and permanently enjoining their operation. The court's opinion set forth two alternative grounds: (1) the Commission failed to enforce the requirements of subparagraphs 8 and 9 of 49 C.F.R. § 1131.2(c); and (2) the Commission was without authority to reopen its proceedings without prior leave of court.

4. *The Caputo Statement.*

Since the Caputo statement is the critical document in this case, we describe it in detail before reaching our argument. The statement is long and carefully composed. It repeatedly underscores the importance of the defense mission of the Department, and it provides a certain amount of detail on a variety of topics. But, if the statement is read with an eye toward the central question of compliance with subparagraphs 8 and 9 of the regulations, no amount of skillful draftsmanship can obscure the almost total want of specificity respecting DOD's allegedly unsatisfactory experience with existing carriers. The five portions of the statement relevant to this critical element of DOD's showing may be summarized as follows:

a. Having listed some fifty items as "representative" of

the "thousands" of commodities that DOD must move in "tremendous volume" in the involved states, and having asserted without specification that "a part" of this volume must be transported "in the most expeditious manner possible," Mr. Caputo states that existing carriers have not in "many, many instances" accomplished that objective. He then provides, not the instances, but three alleged reasons. (1) A "majority" of existing service is joint-line, and "[e]xperience has shown" that as to such service DOD must "in some cases" allow 24 hours for each 300 miles, whereas single-line service over direct routes with two-man driving teams "generally" takes only 8 hours for each 300 miles. But he does not say how many cases of slow joint-line service comprise the "some," nor does he identify those cases in any way. (2) "Virtually all" existing carriers move over regular routes, which are "often" circuitous. He does not say how often is "often," how circuitous is "circuitous," or how often irregular route carriers in practice operate more directly. (3) "Some" regular route carriers use single drivers rather than two-man teams, which "sometimes" causes delays because of the resulting substitution of drivers and power units during the movement. He does not say how often, how much delay, how many carriers are involved, or which points are affected. (AFL J.S., App. D, pp. 21a-23a.)

b. The next portion of the statement is evidently designed to supply the detailed evidence to support the preceding general assertions respecting the overall inadequacy of existing service. But *only three* examples are cited and even as to those examples little detail is given. Thus, for the first example DOD asserts that "some" shipments of explosives between given points by joint-line service require 6 to 11 days as against "third morning" delivery by an existing single-line carrier. Mr. Caputo does not indicate how many is "some" nor does he name the carriers. Next, on general

shipments from St. Louis to points in California, the statement contains the unsupported assertion that "'transit times' that could be afforded by carriers holding 'single line' authority for operation over irregular routes would be little more than half that now experienced through use of 'regular route' carriers." Finally, a similar comparison of existing joint-line and single-line transportation of shell cases between two points does not identify the carriers involved or indicate why DOD continues to make use of the allegedly inferior joint-line service. (*Id.*, at 24a.)

c. Mr. Caputo next identifies several special problems of DOD that allegedly are not solved through use of existing carriers. First, in "many" instances it is necessary to coordinate the arrival of inbound shipments with the production schedules of manufacturing installations. But here again only two examples are given in support of the conclusion that this is a problem that arises "many" times; only *one* example is given to show that the use of existing carriers is not adequate to solve the problem; and with respect to that example the statement does not identify the carriers that allegedly have performed unsatisfactorily. Next, where shipments are assigned to specific vessels or aircraft for trans-shipment, "DOD has experienced situations" in which existing carriers failed to deliver in time. But only one "concrete example" is provided, and as to that the allegedly defaulting carriers are not named and there is no indication as to how often they allegedly defaulted. The third problem is that, although "at times" it is "desirable" to make up truckload shipments of mixed commodities, in "many" cases existing carriers lack authority to transport one or more of the commodities. How often such shipments are refused, which carriers are involved, and how urgent a problem it is are questions left unanswered. (*Id.*, at 28a-30a.)

d. The statement cites five examples of AFL's "excellent" service. In each case, AFL was able to make delivery within the required time, whereas "based upon [DOD's] experience" no existing carrier could have met the deadline. But the carriers that allegedly could not have performed are not identified; there is no indication whether they were asked; nor is there any description of the "experience" upon which DOD's judgment was assertedly based. (*Id.*, at 31a-33a.)

e. Finally, even though existing service may be adequate for some commodities between certain points, "any transportation system which is largely comprised of carriers holding 'bits and pieces' of authority . . . is inherently inefficient." The statement cites no instance in which the "bits and pieces" system was responsible for service failure, nor does it undertake to support its conclusion in any other way. (*Id.*, at 25a.)

It was upon the basis of these generalizations, supported by this sparse citation of facts, that DOD alleged that existing carriers have failed to provide reliable, efficient, and expedited service and have accordingly been unable to meet DOD's imperative shipping needs. And it was upon the basis of this allegation that the Commission in large measure rested its decision. Thus, the Commission's final order recites that DOD established "[t]hat it has experienced inefficient and circuitous joint-line transportation by the use of existing carrier services which have been deficient for its needs . . . ." (AFL J.S., App. E, p. 36a.) In so concluding without requiring DOD to comply with the governing regulations, as we now show, the Commission erred.

Argument

The decision of the lower court rests upon two rules of incontestible validity. The first is that, where an agency promulgates regulations securing important interests of

parties to adjudicatory proceedings, the agency may not lift those regulations in particular cases without good cause. Appellants' suggestion that this principle may not apply to regulations of the sort here involved is clearly wrong, as we show below. Commission counsel's main effort, however, is to demonstrate either that in fact the regulations were followed or that there was good cause for non-compliance. While we demonstrate that both contentions are wrong, we also show that this Court need not resolve those questions, for the Commission itself did not so much as hint that its action was based upon the position now advanced by counsel.

Alternatively, the lower court held that the Commission had no authority to reopen the proceeding and issue its new order without the consent of the court. As we will demonstrate, every court that has spoken to this general question, including this Court, has taken the same view as the lower court respecting the jurisdiction of the Commission as well as other administrative agencies once judicial review has been properly invoked. Moreover, we also show that this view is as sound in principle as it is firmly grounded in precedent.

I

The Lower Court Did Not Err in Holding the Commission's Orders Infirm Because of the Commission's Failure to Enforce Its Own Regulations.

This Court has established and consistently applied the important principle of administrative due process that an executive agency must scrupulously observe its own rules and regulations. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260; *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535; *Yellin* v. *United States*, 374 U.S. 109.

The lower federal courts have vigorously enforced this canon against the various administrative agencies, including the Interstate Commerce Commission.[15] In accordance with this principle, the District Court held that the Commission's action was invalid because it failed to enforce its own rules governing the information required of the supporting shipper.

Appellants advance the threshold contentions that the regulations here involved are not binding, that they cannot narrow the Commission's statutory discretion, and that in any event they may be ignored when the record contains any evidence to support the Commission's order. Beyond that, however, they suggest that the rules were either substantially complied with or waived with good cause. Each of these arguments is without merit.

A. *The Regulations Are Binding on the Commission.*

1. Appellant AFL seeks to distinguish *Service* and *Accardi* on the ground that the regulations here were meant to confer no rights upon protesting carriers but only to facilitate the Commission's handling of temporary authority applications (J.S. pp. 20-21 & n. 19). The Commission conspicuously declines to make this argument (J.S. pp. 9-10), and for good reason. This Court rejected the same contention in analogous circumstances in *Yellin* v. *United States,* 374 U.S. 109, a case that involved the alleged viola-

[15] See, *e.g., Hammond* v. *Lenfest,* 398 F.2d 705 (2d Cir. 1968) ("a validly promulgated regulation binds the government as much as the individuals subject to the regulation"); *Upjohn Co.* v. *Pennsylvania R.R.,* 381 F.2d 4 (6th Cir. 1967) (ICC has no power to waive its own rules of practice); *Pacific Molasses Co.* v. *FTC,* 356 F.2d 386 (5th Cir. 1966) (rules promulgated by an administrative agency "must be scrupulously observed"); *Sangamon Valley Television Corp.* v. *United States,* 269 F.2d 221 (D.C. Cir. 1959) ("Agency action that substantially and prejudicially violates the agency's rules cannot stand"); *Mississippi Valley Barge Line Co.* v. *United States,* 252 F. Supp. 162 (E.D. Mo. 1966), *appeal dismissed,* 385 U.S. 32 (ICC action invalid unless pertinent rules are followed).

tion of a House Un-American Activities Committee rule requiring, in certain circumstances, that a witness be interrogated initially in executive, rather than public, session. The Government took the position that the Committee's rule "was written to provide guidance for the Committee alone and that it was not designed to confer upon witnesses . . . the right to have the Committee act . . . according to the standards set forth in the rule." *Id.*, at 115. The Court rejected the argument after concluding that the structure of the Committee's rules and the history of its practice reflected an intent "to assure a witness fair treatment . . . ." *Id.*, at 116.

Likewise, an examination of the Commission's temporary authority rules reveals that they are designed, not only for the Commission's guidance, but also to carry out the Commission's representations to the Congress that it would "protect the legitimate interests of [protesting] . . . carriers . . . ." (See page 5 *supra*.) As we have shown in detail above, the rules assure those carriers a meaningful opportunity to reply to the claims of the applicant and the supporting shipper by requiring answers to the kind of questions that might be asked on cross-examination. As we have also shown, subparagraphs 8 and 9 (the ones the Commission was found to have ignored) are critical elements in this scheme because they are designed to elicit information regarding specific service failures, information that existing carriers are in a unique position to discredit. The importance of that information is perhaps most clearly illustrated by the prejudicial effect of a shipper's failure to provide it. As we demonstrate below (pages 28-29 *infra*), that effect in this case was substantial. Finally, we need not look far for evidence of the Commission's own practices respecting the rules; one of its stated reasons for reopening the proceedings herein was to afford the protestants "an opportunity to reply" to DOD's new claims (AFL J.S.,

App. F. p. 40a). Thus, there can be no serious doubt that, under the *Yellin* standards, the *Accardi-Service* principle fully applies to the temporary authority rules.

It merits notice that the lower federal courts have consistently applied the same test as that used in *Yellin* and have permitted departure from agency rules only where they are clearly unrelated to the agency's decision-making and information-gathering functions. *Compare, e.g., Herak* v. *Kelly*, 391 F.2d 216 (9th Cir. 1968) (enforcing rule whose purpose "is to enable [the employee] . . . to make an effective administrative appeal"); *Atlantic Coast Line R.R.* v. *United States*, 173 F. Supp. 871 (E.D. Va. 1958) (ICC could not waive rule that afforded an "opportunity to reply to the petition seeking a reconsideration"), *with McKenna* v. *Seaton*, 259 F.2d 780 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 835 (non-compliance with a rule whose purpose was not related to decision-making held to have no special significance to a fair and reasonable administration of the laws).

2. Both appellants also suggest that, for some unexplained reason, the regulations cannot be applied in derogation of the discretion committed to the Commission by the temporary authority statute. Thus, the Commission objects that the lower court's decision "will impose more rigid standards on the grant of temporary authority than the summary procedures envisioned by the statute" (J.S. p. 10). And, in a variant of this approach, AFL argues that "the lower court failed to apply the proper scope of review," and that regardless of the regulations the lower court was obliged to affirm the Commission's order if there was "any evidence in the administrative record" supporting that order (J.S. p. 18). These arguments are manifestly incorrect, for they are based upon the supposition that an agency may not limit its statutory discretion by promulgation of regulations.

That the agecy *may* so restrict its own power, however, is clear from *Service*, where the Court held the Secretary of

State to his own rules regarding the discharge of an employee from the Foreign Service, a matter in which the Secretary, by statute, had "absolute discretion."

> While it is of course true that . . . the Secretary was not obligated to impose upon himself these more rigorous . . . standards, neither was he prohibited from doing so . . . and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them. (354 U.S., at 388.)

In *Vitarelli*, the Court went even further. The Secretary of the Interior had dismissed an employee on charges that his employment was contrary to the best interests of national security. Because of his status in the Department, the employee *could* have been dismissed summarily and without cause.

> Since, however, the Secretary gratuitously decided to give a reason, and that reason was national security, he was obligated to conform to the procedural standards he had formulated for the dismissal of employees on security grounds. (359 U.S., at 539.)[16]

There is, of course, no question that the Commission enjoys statutory discretion in the matter of temporary authority applications. But neither is there any question that the Commission, by promulgating its temporary authority regulations, defined the manner in which it would exercise that discretion. Having imposed these standards upon itself, the Commission cannot proceed without regard to them.

Nor is AFL's variant of the argument any more persuasive. Certainly, *Accardi* and *Service* do not contemplate that

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[16] And see *Hammond* v. *Lenfest*, *supra* note 15, 398 F.2d, at 715 (a valid regulation is no less binding when action is discretionary); *Sheridan-Wyoming Coal Co.* v. *Krug*, 172 F.2d 282, 288 (D.C. Cir. 1949) (wide discretion does not include discretion to violate applicable regulation).

the Commission's obligation to comply with its own rules ceases the moment it receives any evidence upon which to base its decision. We are not here concerned with the scope of review of the Commission's order. The question here is whether the Commission must adhere to the rules governing its decision-making and information-gathering functions. As to that, even if there were substantial evidence in the record supporting the Commission's action, it must still be overturned if important regulations were violated. That was the precise holding of *Camero* v. *United States,* 345 F.2d 798 (Ct. Cl. 1965), the one case that expressly states what is implicit in countless others.

B. *The Commission's Order Cannot Be Sustained Either on the Ground of Substantial Compliance With the Regulations or on the Ground of Waiver for Good Cause.*

The principal objection of appellant Commission to the decision below is that it "exalts form over substance" (J.S. p. 9). That argument appears to be made under two heads. First, appellant contends that the court required "literal" rather than "reasonable" compliance with the regulations (J.S. pp. 8-9, 12). As we understand it, this implies that there was in fact substantial, albeit not literal, compliance by DOD with the regulations. Second, appellant contends that the court should not have "[r]equired the supporting shipper to perform the futile gesture of appealing to existing carriers for service which they do not and can not perform under their franchises" (J.S. p. 9). As we understand it, this comes to the rather different, evidently alternative, argument that, although the DOD statement did not comply with the regulations either literally or substantially, there was good cause for waiving this default.

While the "form over substance" aphorism has a nice ring, it has nothing to do with the decision of the lower

court. That court did not reject the established principle that only substantial, rather than literal, compliance with regulations is required,[17] and that even substantial compliance can be waived for good cause shown.[18] To have done so would have been to go back on a prior opinion of the same court, written by the same author, and involving the same regulations. That opinion stated as the governing principle that there must be "enforcement of reasonable compliance" unless there is "good cause shown" for waiver. *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453, 457 (1968). But the lower court did not cast doubt on *Acme*. On the contrary, the court expressly relied upon it (see AFL J.S., App. A, pp. 6a, 12a).

To be sure, the lower court did not explicitly treat questions of substantial compliance or good cause waiver. But that is understandable, since these contentions by appellants were, and are, wholly insubstantial, as we now demonstrate.

1. The Commission's order, in the first place, cannot be sustained on either the substantial compliance or the good cause waiver theory, because the Commission itself did not in its order endorse either theory explicitly or implicitly. Since the court had already, in issuing its first stay, highlighted the non-compliance with regulations issue, if the Commission believed that there was substantial compliance or good cause for waiver, presumably it would have said so. The court was not compelled to entertain Commission counsel's "*post hoc* rationalizations" respecting the Commission's action; indeed, to have done so would have been error. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168; *SEC* v. *Chenery Corp.*, 318 U.S. 80.

2. Moreover, there was in fact no substantial compliance.

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[17] *E.g.*, *Mendelson* v. *Macy*, 356 F.2d 796, 801 (D.C. Cir. 1966).

[18] *Wyszatycki* v. *FCC*, 267 F.2d 676 (D.C. Cir. 1959); see, *e.g.*, *NLRB* v. *Albritton Engineering Corp.*, 340 F.2d 281, 285-86 (5th Cir. 1965), *cert. denied*, 382 U.S. 815; *NLRB* v. *Monsanto Chem. Co.*, 205 F.2d 763, 764 (8th Cir. 1953).

Subparagraphs 8 and 9 in effect require the answers to five questions:

(a) Have efforts been made to obtain the service from existing carriers?

(b) If so, what were the dates of such efforts?

(c) What were the results of those efforts?

(d) What are the names and addresses of existing carriers who have either failed or refused to provide the service?

(e) What reasons were given for those failures or refusals?

Mr. Caputo makes quite clear that DOD has had vast experience with existing carriers in the territories involved and alleges that the experience has been markedly unsatisfactory. That is, "yes" to question (a), "unfavorable" to question (c). However, as we have shown in detail above (pages 10-13 *supra*), nowhere in his statement are the required details given as to a single service failure or refusal: no dates, no names, no addresses, no reasons given by the guilty carriers. Mr. Caputo does not even undertake to summarize the necessary information. There is no indication of how many times DOD has experienced service failures, over what routes, or with regard to which commodities. In short, none of the specific information required by the regulation is provided in the statement. It contains only the general conclusions and vague assertions that the rules were designed to penetrate. By no stretch of the imagination can this be deemed reasonable compliance.[19]

[19] Although DOD did not claim that it was unable to comply literally with the regulations, if it had made such a claim doubtless less than literal compliance would have been acceptable. Because of the volume of traffic and the number of routes involved in AFL's application, a detailed recording of service failures over past decades would obviously be unmanageable. What would be required is some effort to particularize the alleged failures

3. Nor is counsel's good cause waiver argument well taken. The contention is rooted in the notion that the service provided by AFL is, for one reason or another, unique. Since no certificated carrier can offer that service, the argument runs, it would have been bootless to require Mr. Caputo to recount DOD's unsuccessful efforts to obtain it.

Since every effort of Commission counsel to salvage the order by identifying one or another "unique" feature of AFL service founders either on the facts of record or on Commission regulations indicating that the feature is not unique, it is hardly surprising either that the Commission did not adopt this theory in its order or that counsel are now rather less than precise in formulating it. The detail of the theory, and its flaws, are as follows:

First, counsel assert that AFL's service is single-line, and that no existing carrier can match it with joint-line operations (ICC J.S. pp. 3, 12). But as counsel are compelled to concede, the Commission's own rule "provides that a desire for single-line service is insufficient to grant temporary authority" (J.S. p. 12 n. 9).[20] Accordingly, as they are also compelled to concede, protestants' claims that their joint-line service was sufficient presented "questions of fact for determination by the Commission" (J.S. p. 12), not a question of law that could be determined simply by

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in a given period of, say, six months, or perhaps a complete and detailed summary of those failures, including the carriers, routes, commodities, and time period involved.

[20] "(4) *Single-line service.* Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved." 49 C.F.R. § 1131.4 (b)(4).

reference to the presence or absence of single-line service. Moreover, Mr. Caputo recognized, and many of the protestants asserted, that existing carriers offered single-line service between many points in the involved states (see AFL J.S., App. D, pp. 22a-25a).

At another point, counsel suggest that the uniqueness of AFL's service consists of its ability to employ irregular routes in its single-line service (J.S. p. 3). Again, however, there is nothing inherently superior about irregular route service. It is certainly a question of fact whether the regular route carriers are able to move as, or more efficiently than the irregular route carrier in question. In any event, existing carriers offered irregular route service between some points, as is implied in the Caputo statement itself (see *id.*, at 23a, 24a).[21]

Ultimately, perhaps, counsel rest upon the "completeness" of the service offered by AFL (ICC J.S. pp. 4 n. 3, 12). That is, even if existing carriers can provide the desired service between certain points in the involved states, a transportation system consisting of such "bits and pieces of commodity and geographical authority" is "inherently" inefficient (J.S. p. 5), and that inherent inefficiency justifies a grant of temporary authority to a carrier that will not be disabled by these limitations.[22]

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[21] The same can be said of a combination of single-line, irregular route, and two-man driving team service, of which Mr. Caputo spoke highly but which Commission counsel do not mention. A number of joint-line, regular route, single driver carriers claimed that their service could match that of AFL, while at least one other carrier claimed to offer precisely the combined service referred to by Mr. Caputo (see page 9 *supra*).

[22] It is noteworthy that, although Mr. Caputo characterizes the "bits and pieces" system as inherently inefficient, he simultaneously emphasizes that AFL's service is used to complement rather than replace the existing system and that "collectively these services have proven adequate . . . ." (AFL J.S., App. D, p. 31a.) Apparently, AFL is but another piece of the "bits and pieces." If the system is inherently inefficient, it is difficult to understand how adding to that system can render it adequate.

Had the Commission itself adopted this extraordinary view, the question presented to the lower court would surely have been different, for under counsel's approach the temporary authority statute is turned on its head. Instead of permitting grants of such authority only in cases of genuine emergency where no carrier can afford reasonably adequate service, the statute would apply to situations where there is full service available from a number of carriers for every commodity between every origin and every destination but where the shipper finds it more convenient to deal with a single carrier that could fully serve all points in a multi-state region.

But the Commission, as to this matter at least, was evidently guided both by the statute and by its own regulations. Those regulations stand squarely in the way of the "complete service" contention suggested by counsel. They provide in pertinent part that "[r]equests for temporary authority on the basis of 'providing a complete service to a shipper,' even though existing carriers are participating in the traffic . . . require special justification," and that "[g]enerally . . . the applicant must establish with reasonable certainty that the existing carriers cannot adequately serve the shipper in their authorized territories . . . ." [23] Thus, not only is there nothing inherently superior about "complete service" within the meaning of the temporary authority statute, but the Commission's own rules create

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[23] "(5) *Complete service.* Requests for temporary authority on the basis of 'providing a complete service to a shipper,' even though existing carriers are participating in the traffic and in many instances can provide a substantial part of the service, require special justification. Generally, in such instances, the applicant must establish with reasonable certainty that the existing carriers cannot adequately serve the shipper in their authorized territories, or that the supporting shipper has revised its distribution methods to such an extent that there actually is an immediate and urgent need for the complete service proposed." 49 C.F.R. § 1131.4(b)(5).

a strong presumption against basing a grant of authority upon the shipper's desire for such a service.

In short, it is clear, as Commission counsel finally recognize (J.S. p. 12), that AFL's application, DOD's claims, and protestants' submissions presented questions of fact: whether the kind of service offered by AFL was in fact more expeditious than existing service, and, if it was, whether DOD in fact had an imperative need for that expedition between all points and for all commodities. In support of the application, DOD made numerous statements regarding the inadequacies of existing service and those claims were relied upon by the Commission in granting the temporary authority. It is precisely in such circumstances that subparagraphs 8 and 9 of the pertinent regulation come forcefully into play to assure the protesting carriers a meaningful opportunity to reply. There is no justification for waiving those requirements; there is every reason to enforce them vigorously.

4. In arguing substantial compliance and good cause, appellants rely on *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam*, 394 U.S. 718. That case, however, was altogether different from this one.

When the railroad that was Railway Express Agency's link between Washington, D.C., and Richmond, Virginia, gave notice that it would discontinue its less-than-carload express shipments, REA applied for temporary authority to continue its shipments by truck. REA submitted supporting statements from eleven shippers, each of whom stated: "I am currently obtaining the service I need from REA Express, and, accordingly, have had no occasion to seek express service from anyone else." The protesting carriers challenged the Commission's grant of temporary authority on the ground that the supporting statements did not conform to the requirements of 49 C.F.R. § 1131.2(c)(8)

and (9). The District Court properly upheld the Commission, and this Court affirmed summarily. It is clear that the supporting statement complied *in full* with the regulations. The shippers had never had occasion to seek other service, since REA provided express service without interruption. Thus, they correctly answered the threshold question by saying that they had *not* made efforts to obtain the service from existing carriers. There could have been no other answer, and, of course, the other questions were thereby rendered inapplicable. Thus, the order could not have been set aside for want of compliance with the regulations. The only genuine question was whether the applicant had in fact introduced evidence sufficient to warrant the findings required by the statute.[24]

Our case is quite different. The question is not whether the evidence was sufficient, but whether the regulations were followed. As to that, the DOD statement, in contrast to the statements of the REA shippers, makes entirely clear that

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[24] The regulations do not require that the supporting shipper make efforts to obtain service from existing carriers; rather, they assure that if such efforts have been made the required details are given, and that if no efforts have been made that fact is revealed. To be sure, in the normal case the failure of the shipper to have sought service from existing carriers will be fatal. That is, a "no" answer to the initial question of subparagraph 8 will ordinarily mean that the applicant will be unable to demonstrate the inadequacy of existing service; the application will thus fail, not for noncompliance with the regulations, but for failure of proof under the statute.

In *Estes*, however, that was not the result, because REA's nationwide express service was qualitatively different from any existing service. As the Solicitor General argued to the Supreme Court in that case: "[T]he courts and the Commission have repeatedly recognized the differences between the express service performed by carriers such as REA and the ordinary freight service performed by general commodities motor carriers, such as appellants. *Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328, 332-333 (D. Mass.), affirmed *per curiam*, 376 U.S. 514; *REA Extension—Nashua, N.H.*, 91 M.C.C. 311, 324, 340-341; *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573, 579-583; *Mistletoe Express Service Extension—Texas*, 61 M.C.C. 735, 744-745; *REA Extension—Durant-Kosciusko*, 34 M.C.C. 111, 114." Motion to Affirm, pp. 4-5.

DOD has had vast experience with existing carriers. Thus, as opposed to the REA shippers, DOD could not truthfully have answered "no" to the threshold question. Accordingly, in contrast to the REA shippers, DOD was required to detail that experience in some reasonable manner in order to give protestants a chance to respond to the charges that their service was inadequate.

Another case relied upon by appellants, *Superior Trucking Co.* v. *United States*, 1969 CCH Fed. Car. Cas. ¶ 82,108 (N.D. Ga., June 4, 1969), is similarly distinguishable. The court there emphasized that the supporting shippers' statements "catalog the efforts made, without success, to secure plaintiffs' services." The court's brief summary of that cataloging speaks for itself;[25] under those circumstances, the court properly found substantial compliance with the regulations.

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[25] "Congaree Iron and Steel Company stated that although they have used Moss Trucking and Home Transportation on occasion, neither generally has had sufficient equipment of the type required at the times and places needed. Congaree gives specific dates when Home Transportation was called for service and also states that Moss was called on numerous occasions. Owen Joist Corporation stated, in a November 4, 1968, communication that it had contacted all of the plaintiffs over the past few days but none had the necessary equipment presently available. Owen Steel Company stated, in a December 11, 1968, letter that it had called plaintiffs but none had trailers at present. Dixiana Steel Company stated that they were unable to use Superior Trucking, one of the plaintiffs, due to the unavailability of the necessary equipment, and Moss due to their remote location. Owen Electric Company stated that both Superior and Home Transportation advised them that it would be one week or longer before they could furnish the necessary equipment, and that while on occasion Home Transportation furnished some units, they did not have enough to handle Owen Electric's requirements. Owen Miscellaneous Metals, Inc. contended there was no specialized carrier within 100 miles of its plant, with the exception of Equipment Transport. Kline Iron and Steel Company and Allcraft Steel Company both stated they did no business with Superior in 1968 because of the unavailability of their service. R. B. M. Metals Company stated that to its knowledge only Equipment Transport had the equipment to serve their needs, and Colonial Iron Works, Inc. and Steel Specialty Corporation said much the same thing."

C. *Appellees Were Prejudiced by the Commission's Non-Compliance.*

Appellant AFL suggests that "the ICC's departure from these regulations could not conceivably prejudice competing carriers," because those carriers had "ample opportunity to submit their own evidence, and to secure judicial review based upon the entire record" (J.S. p. 20 n. 19).

Assuming that a showing of prejudice is essential,[26] the protesting carriers were in fact seriously prejudiced. Although DOD asserted that its experience with existing carriers was unfavorable, and although the Commission relied upon those assertions, no carriers were named, no dates were given, no specific identification was made of even one actual service failure. The protestants, who claimed the capability of providing the needed service, were thus deprived of their opportunity to mitigate or dispute the facts upon which DOD relied.

That this deprivation was harmful is indisputable. Had the required information been given, it might have developed, for example, that only a very small part of DOD's traffic must move with special speed, that the "many, many instances" in which existing service has failed amounted to only 15, that the "some" cases in which joint-line service takes 24 hours per 300 miles have really been only a handful—in short that the service failures were greatly overstated. Moreover, with specific cases of alleged failures before them, the protestants might have been in a position to submit documentary evidence to dispute the facts. (Even on the meager factual presentation in the Caputo statement,

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[26] Although the rule has been stated to include a *prejudicial* violation of agency regulations, *e.g., Sangamon Valley Television Corp.* v. *United States, supra* note 15, 269 F.2d, at 224, the one court squarely presented with the issue declined to pass on it. *Pacific Molasses Co.* v. *FTC, supra* note 15, 356 F.2d, at 387 n. 3.

several carriers were able to find careless misstatements and overbroad generalizations.) Certainly, it cannot be supposed that the outcome of this proceeding could not have been different. Presented with a catalog of the alleged service failures and with the denials or explanations of the carriers involved, the Commission might well have found itself unable to conclude that existing service was inadequate or that DOD's need was imperative. In such circumstances, appellees were "at least entitled to have the [Commission] follow its rules and give [them] consideration according to the standards it has adopted . . . ." *Yellin* v. *United States, supra,* 374 U.S., at 121.

D. *The District Court's Holding Does Not Hamper the Commission.*

The Commission and AFL repeatedly intimate that the decision below will seriously impair the Commission's ability properly to exercise its discretion under 49 U.S.C. § 310a(a). It is not easy to see why this is so, since even as the regulations stand, they can doubtless be waived for good cause. In any event, as Judge Boldt pointed out in *Acme Cartage:* "If particular rules prove overrigid or otherwise unsatisfactory in practice they can be amended as experience dictates." 290 F. Supp., at 457. Having imposed upon itself the procedural rules in question, however, the Commission cannot, "so long as the Regulations [remain] unchanged, proceed without regard to them." *Service* v. *Dulles, supra,* 354 U.S., at 388.

II

The Lower Court Did Not Err in Setting Aside the Commission's Order Because the Commission Had Failed to Secure Authorization of the Court to Reopen the Proceeding.

The lower court, as an alternative basis for its decision, held that the Commission had exceeded its authority in reopening the proceedings to receive additional evidence without leave of court. As to this issue, these undisputed facts are crucial: (1) When the litigation was instituted the district court properly acquired jurisdiction, as the Commission concedes (J.S. pp. 15-16). (2) In its answer, as well as in its brief below, the Commission conceded that its first order granting the temporary authority "may not have been based on evidence to support its conclusion" (AFL J.S., App. A, p. 8a). If the matter had rested there, the order clearly could have been set aside on this ground. (3) The court preliminarily enjoined that order from going into effect (*id.*, at 4a). At that point, in sum, jurisdiction had vested in the court; the court had exercised its jurisdiction by staying the Commission's order; the Commission and appellees were before the court as opposing litigants with respect to the validity of that order; and the order, as the Commission was in effect to concede, was invalid for want of evidentiary support. (4) The Commission thereafter, on its own motion and without consent of the court, reopened the proceedings "for the purpose of receiving" additional evidence from DOD and any rebuttal evidence (AFL J.S., App. F, p. 40a). (5) After receiving that evidence, the Commission reissued an order identical to the order that had been stayed, and then returned to court urging that the new evidence salvaged its case.

Under these circumstances, the lower court held that the Commission had exceeded its authority in reopening the proceedings without consent of court. That holding was correct under the decisions of this Court and lower federal courts, as we now show. Moreover, as we also show, the holding is sound in principle. The purpose of the requirement of judicial supervision is to restrain any temptation of the Commission, once it is in a litigating stance, to act as a litigant while purporting to act as a quasi-judicial tribunal.

The applicable rule was laid down in *Inland Steel Co.* v. *United States*, 306 U.S. 153. There the District Court had issued an interlocutory injunction staying an ICC order subject to certain conditions and the Commission subsequently entered an order suspending its original order. It was argued that this second order had deprived the court of jurisdiction to enforce the conditions it had imposed. This Court said:

> [S]ince the court had exercised jurisdiction to review and suspend the Commission's report and order, the administrative body was without power to act inconsistently with the court's jurisdiction .... (*Id.*, at 160.) [27]

To be sure, the facts in *Inland Steel* were not the facts here, and the principle was stated in terms general enough so that we cannot reasonably contend that one need only read the passage in *Inland Steel* to decide the case at bar. However, *Inland Steel* is important in two respects. First, it established, contrary to the Commission's apparent position in the case at bar, that there is *some* significant limita-

[27] On the facts of the case, the Court went on to construe the Commission's second order as merely a recognition of the court's injunction (306 U.S., at 160).

tion upon the power of the ICC once judicial review is invoked. And, second, in citing as relevant precedent a prior decision of this Court relating to the NLRB (*id.*, at 160 n. 13), the Court in *Inland Steel* suggested that the character of this limitation may be the same for the ICC as for the NLRB.

The decision cited was *Ford Motor Co.* v. *NLRB*, 305 U.S. 364. There the National Labor Relations Board had sought to withdraw a petition for enforcement of an order after an intervening decision by this Court apparently had persuaded the Board that enforcement would be denied unless certain errors were corrected. The Court held that, from the time the petition for enforcement was filed, the Board lost authority to modify its order (*id.*, at 368) and had no right to withdraw its petition except with the consent of the reviewing court:

> Considering the scope and purpose of the jurisdiction of the court in a proceeding under §10(e) [of the National Labor Relations Act] and the position and rights of the person proceeded against, we are unable to conclude that the Board has an absolute right to withdraw its petition at its pleasure. We think that permission to withdraw must rest in the sound discretion of the court to be exercised in the light of the circumstances of the particular case. (*Id.*, at 370.)

Cf. United States v. *Morton Salt Co.*, 338 U.S. 632, 643.

Clearly, if the *Ford Motor* doctrine is controlling in the case at bar, the Commission exceeded its authority. In judging the relevance of that doctrine, it is important to note that the statutes governing judicial review of most other federal agencies are substantially the same as that construed in *Ford Motor*.[28] Where an agency maintains that

[28] *E.g.*, 15 U.S.C. § 45(c) (Federal Trade Commission); 15 U.S.C. § 717r(b) and 16 U.S.C. § 825l (Federal Power Commission); 47 U.S.C. § 402 and 28 U.S.C. §§ 2341-2347 (Federal Communications Commission); 49 U.S.C. 1486 (Civil Aeronautics Board).

it is untouched by limitations imposed upon other agencies by the Congress and the Court, it should be able to cite either a clear, even if perhaps inexplicable, legislative discrimination in its favor or a compelling policy reason for according it a unique status. But the ICC can cite neither.

As to the pertinent legislation, it is true that the statutory review provisions governing orders of these other agencies are in some respects different from those relating to the orders of the ICC.[29] Thus, as to these agencies the statutes provide that, if a party wishes to introduce further evidence, it must secure the approval of the reviewing court; and the statutes also say that the court in which a petitioning party files the transcript has "exclusive" jurisdiction. But those differences are not determinative. The "exclusive jurisdiction" provision can as readily be regarded as identifying the reviewing forum among the various federal courts as defining the court's relation to the agency. Indeed, that is precisely how this Court viewed the provision in *Cheng Fan Kwok* v. *Immigration & Naturalization Service*, 392 U.S. 206, 209-10. And the provision respecting introduction of evidence was obviously necessary because as to these agencies review was centered in the courts of appeals, which have no fact finding powers, rather than in the district courts.[30]

Moreover, these statutory provisions were not regarded by this Court as dispositive in *Ford Motor*, where the NLRB did not place its request to reopen the proceeding upon a desire to receive more evidence. Thus, while the Court na-

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[29] For the NLRB, see 29 U.S.C. §§ 160(e) and (f). For the other agencies, see note 28 *supra*. For the ICC, see 28 U.S.C. §§ 1336, 2321-2325.

[30] We have reviewed the legislative history of the statutes cited in footnotes 28 and 29 *supra*. Contrary to appellants' argument, there is no suggestion whatsoever that the Congress intended to establish any different rule with respect to the exclusiveness of the court's jurisdiction when it is reviewing an order of the ICC than when it is reviewing an order of any other agency.

turally rested in part upon these provisions as indicating in a general way the status of the court in a judicial review proceeding, it also pointed to the underlying policy consideration—"the position and rights of the person proceeded against." *Id.*, at 370. As to that consideration, there is of course no warrant for regarding the ICC as different from any other agency.

With respect to lower federal courts, virtually every decision that is in point is in accord that an administrative agency, including the ICC, cannot reopen quasi-judicial proceedings after the reviewing court has assumed jurisdiction except with the consent of the court. In this connection, AFL's reliance on *Atchison, T. & S.F. Ry.* v. *United States*, 231 F. Supp. 422 (N.D. Ill. 1964), is curious indeed. According to AFL, that decision "expressly upheld . . . the Commission's right to reopen its proceedings without leave of court during the pendency of a judicial review action" (AFL J.S. p. 22). Quite to the contrary, the court in the *Atchison* case severely criticized the action of the Commission in reopening the proceedings. A large part of the court's opinion is devoted to a lucid statement of the very policy consideration upon which we rely—the possibility that, under the guise of reconsidering its action, the agency may simply attempt to recapture its litigating position if it is able to reopen its proceedings without court supervision. *Id.*, at 428. Indeed, the court stated that this consideration "might well be controlling and demand" that the Commission's order be set aside were it not for the fact that the plaintiffs had waived such a claim. *Id.*, at 428-29. In the instant case, of course, there was no such waiver. Rather, appellees pressed the point before the court below and before the Commission.

Anchor Line, Ltd. v. *FMC*, 299 F.2d 124 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 922, is another decision relied upon by appellants that actually supports the decision of the district court herein. There, after a complaint had been filed

to review an order of the Maritime Commission, the Commission reopened its proceedings and reversed itself. In a subsequent action brought by a competitor of the plaintiff in the first proceeding, the court said:

> It is true that when an agency seeks to reconsider its action it should move the court to remand or hold the case in abeyance pending reconsideration by the agency. See Wrather-Alvarez Broadcasting Co. v. Federal Communications Commission . . . (248 F.2d 646 (D.C. Cir. 1957)). Cf. Smith v. Pollin, 194 F.2d 349 (D.C. Cir. 1952). We do not condone the failure to follow that procedure. (299 F.2d, at 125.) [31]

However, since the Commission had reopened its proceedings not to reinforce its position as a litigant but rather to reverse itself and grant the plaintiff the very relief he was seeking, the court correctly held that "in the circumstances of the present case" the failure to follow the proper procedure was not prejudicial.

Every other lower federal court to consider the question has adhered to the principles stated in the cases discussed above. See *McClatchy Broadcasting Co.* v. *FCC*, 239 F.2d 19 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918; *Arrow*

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[31] The Court's citation of *Smith* v. *Pollin* is significant. That case dealt with the question of the appropriate forum, as between the district court and the court of appeals, for the filing of a motion for a new trial after an appeal had been taken. In holding that application for remand must be made, the court of appeals said: "It is clear that the District Court could not grant a motion for a new trial in a case which is pending in this court upon appeal. Jurisdiction is in this court while the appeal is pending." 194 F.2d, at 350. *Accord, Newton* v. *Consolidated Gas Co.*, 258 U.S. 165, 177; *Hovey* v. *McDonald*, 109 U.S. 150, 157 ("One general rule in all cases . . . is that an appeal suspends the power of the court below to proceed further in the cause"); *Ryan* v. *United States Lines Co.*, 303 F.2d 430, 433-34 (2d Cir. 1962); *Wolf* v. *Nazareth Enterprises, Inc.*, 303 F.2d 152, 155 (2d Cir. 1962) ("It is axiomatic that as a general rule a court has no power to reopen a final judgment once an appeal is taken as jurisdiction passes to a higher court"); *In re Federal Facilities Realty Trust*, 227 F.2d 651, 654-55 (7th Cir. 1955).

Transportation Co. v. *United States*, 176 F.Supp. 411, 415 (N.D. Ala. 1959), *aff'd*, 361 U.S. 353 ("Once jurisdiction is vested, it cannot be ousted" by subsequent orders of the ICC); *Dixie Carriers, Inc.* v. *United States*, 143 F. Supp. 844 (S.D. Texas 1956), *vacated as moot*, 355 U.S. 179; *United States* v. *Herbold Laboratory, Inc.*, 267 F. Supp. 53, 54 (C.D. Cal. 1967) ("Once [judicial] review is undertaken, neither the Commission nor any other entity has any jurisdiction to interfere in the matter"); *cf. Pan American Petroleum Corp.* v. *FPC*, 322 F.2d 999, 1004 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 941; *Public Service Comm'n* v. *FPC*, 284 F.2d 200, 206 (D.C. Cir. 1960). As is more fully set forth in the margin,[32] the decisions relied upon by appellants either support the decision of the district court (as is true of the *Atchison, T.*

We can perceive of no reason why this "axiomatic" "general rule" would not apply equally in cases of review by a district court of an agency decision as it does in cases involving review by a court of appeals of a district court decision. Apparently the District of Columbia Circuit in *Anchor Line* reached exactly that conclusion.

[32] While the Commission says that "[t]he cases upholding the Commission's continuing jurisdiction to reopen a proceeding while judicial review actions were pending are legion" (J.S. p. 14), the weakness of this precedent is betrayed by the Commission's use of a head count rather than a case identification method for citing this "legion" of authorities. Thus, the Commission says that "[f]rom 1952 through 1968, there were 65 such cases," but of these only one is named. Presumably, the balance consist of the same catalog, now updated, that the Commission provided the court in the *Atchison, T. & S.F.* litigation, as to which the court said:

> "The Government and the Commission have cited to us numerous instances wherein proceedings by the Commission were reopened following the institution of court action. However, it appears from the Government's and the Commission's annotation of them that court approval of the stay of its proceedings, pending Commission reconsideration, was obtained *prior* to the Commission's order reopening the proceedings before it." (231 F. Supp., at 427.) (Emphasis in original.)

The two decisions principally relied upon by the Commission are *Aberdeen & Rockfish R.R.* v. *United States*, 270 F. Supp. 695 (E.D. La. 1967), *aff'd*, 393 U.S. 87, and *United States* v. *Chicago, M., St. P. & P. R. Co.*,

& S.F. and *Anchor Line* cases), or are distinguishable from the case at bar.

Appellants argue that the Commission must have an opportunity to correct its own mistakes. But the rule applied by the lower court does not foreclose that opportunity. It merely assures that the court can satisfy itself that the agency will act, not as a litigant attempting to win a lawsuit by papering over deficiencies in its initial action, but rather as an impartial quasi-judicial body. It is worth noting in this connection that, if the policy urged by the Commission were compelling, presumably it would have led the Congress and this Court to a position different than has been adopted with respect to other agencies. The fact that the Commission seeks a uniquely privileged status among federal agencies suggests that the arguments it advances are less than powerful.

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294 U.S. 499. But they are not pertinent. In *Aberdeen*, the Commission upon reopening did not take additional evidence nor did it change its order in any material respect. Moreover, even if it had it would have made no difference, since the court set aside the Commission's order for other reasons. In *Chicago, M., St. P. & P. R. Co.* the issue was never considered by this Court, and again the Commission's order was set aside for other reasons.

The other decisions cited by one or both appellants are equally beside the point. In *Alamo Express, Inc.* v. *United States*, 239 F. Supp. 694 (W.D. Tex. 1965), *aff'd*, 382 U.S. 19, no court action was pending when the Commission reopened its proceedings. In *Wrather-Alvarez Broadcasting Co.* v. *FCC*, 248 F.2d 646 (D.C. Cir. 1957), the issue was simply whether the court's jurisdiction was ousted by a petition for reconsideration filed with the Commission an hour after the appeal was perfected. The court properly held that it was not. In *Frontier Airlines, Inc.* v. *CAB*, 259 F.2d 808 (D.C. Cir. 1958), the modification made by the agency in its order was not relevant to the judicial review proceedings, and thus as the court noted "no harm was done." *Id.*, at 811. In *Donaldson* v. *Read Magazine*, 333 U.S. 178, the order was not that of a quasi-judicial agency, but rather that of an executive officer. Moreover, the modification made by the officer advantaged rather than prejudiced the plaintiffs. Finally, to the extent there is language in *Evans* v. *FCC*, 113 F.2d 166 (D.C. Cir. 1940), favoring appellants' position, later decisions cited in the text make plain that this language no longer reflects the views of that court. See *Anchor Line, Ltd.* v. *FMC*, *supra*; *McClatchy Broadcasting Co.* v. *FCC*, *supra*.

The Commission also suggests that the action it took in reopening the proceedings did not prejudice the appellees. The notion seems to be that, as long as the final order of the Commission was legally unassailable except on the ground that the Commission had acted without authority in reopening the proceeding, that action should be disregarded since the final order was "correct." But if that were to be the test, the rule that the agency may not reopen without court permission would confer a right without a remedy, for an order entered in violation of the rule could be set aside only where the order was invalid for other reasons. More important, the Commission's argument disregards the interests served by the doctrine applied by the lower court. Given the limited scope of judicial review of Commission actions, the fact that the Commission on reopening may have insulated its order from judicial rejection does not mean that the Commission's action is "correct" in the sense of representing an impartial disposition of the issues. Accordingly, the real test of prejudice should be whether, had the Commission applied to the court, the court might have taken action to protect the right of the private litigants to such an impartial disposition by the Commission.

In this case, plainly such action might have been taken. The court, in the first place, might have concluded that the Commission was overly influenced by a desire to shore up its position in court, and accordingly might have denied a request to reopen. Beyond that, the court might have conditioned a grant of the request upon a variety of procedural safeguards. For example, it might have required that appellees be given an opportunity to cross-examine the DOD witnesses. Or it might have provided guidelines as to the specific details that the DOD would be required to provide in the reopened proceeding, thus giving appellees a meaningful opportunity to submit written rebuttal statements. Or it might have required the Commission to speak in its

final order to the compliance with regulations issue. To be sure, probably neither these nor any similar requirements could insure that the Commission, despite the attack upon its prior order, would act in a wholly impartial fashion upon the reopening. But it cannot be said that such steps would wholly fail of the goal, particularly since they would materially assist in sharpening the issues on judicial review. Accordingly, since the Commission's action deprived the appellees of the opportunity to secure such safeguards, that action undercut precisely those interests that the doctrine of judicial control is designed to protect. The appellees *were* prejudiced.

Finally, the Commission's suggestion (J.S. p. 15 & n. 15) that at any rate in the case at bar the Commission did not have to seek court permission to reopen because of the pendency of properly filed petitions for reconsideration is wrong on two counts. First, the petitions for reconsideration were not properly filed under the Commission's regulations for reasons that we detail in the margin.[33] Second, in any event the principle here involved does not admit of this sort of limitation. Once the agency has taken action that adversely affects private parties so that court jurisdiction is properly invoked, the court must be vested with control over the proceeding if the interests of the private parties are to be protected. If the agency wishes for some reason to retain complete authority to dispose of any pending petitions for reconsideration, it can always stay the effectiveness of its order for the brief period necessary. The Commission could have done so here. Having instead made the order effective immediately, it should not be heard to complain that the court below insisted upon its right to control the proceeding.

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[33] The petitions were improper under the Commission's temporary authority rules, which provide:

> *Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions

CONCLUSION

For the reasons stated above, the judgment of the lower court should be affirmed.

Respectfully submitted,

Of Counsel:

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for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person. (49 C.F.R. § 1131.6(a).)

Division 1's order of September 3 did not "initially" grant or deny the temporary authority but rather reversed a prior order of the Temporary Authorities Board denying the authority. Thus, under the regulations, no further petition for reconsideration was authorized.

Appellants rely upon Rule 101(g) of the Commission's General Rules, 49 C.F.R. § 1100.101(g). But under any normal canons of construction, the temporary authority rules, which are later in time and deal specifically with temporary authority proceedings, are controlling. "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . . Specific terms prevail over the general in the same or another statute, which otherwise might be controlling . . . .' " *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-29. Moreover, it is sensible to apply the special rules rather than the General Rules, for the restrictions of the former upon the filing of petitions for reconsideration are consonant with the general purpose of expediting temporary authority proceedings. Finally, it is questionable whether the Commission could have established a rule authorizing reconsideration of orders of Division 1 sitting as an appellate division even if it had sought to do so. See *Transamerican Freight Lines* v. *United States*, 258 F. Supp. 910 (D. Del. 1966), a decision the Commission evidently concedes is in point but with which it disagrees (J.S. p. 16 n. 15).

APPENDIX A

The Temporary Authority Rules

49 C.F.R. § 1131.2(c) provides:

Supporting statements. Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

APPENDIX B

Headquarters
Department of The Army
Office of The Judge Advocate General
Washington, D.C. 20310

30 April 1968

Mr. Howard McCormack
General Manager
American Farm Lines Co-op
Oklahoma City, OK 73107

Re: Application of American Farm Lines, Inc., to Transport General Commodities Including Class A and B Explosives

Dear Mr. McCormack:

As duly authorized counsel for the Secretary of the Army and the Department of Defense, I have been asked to reply to your request for the Department of Defense support in connection with your application before the Interstate Commerce Commission to transport general commodities, including Class A and B explosives.

The Department of Defense has used the services of American Farm Lines, Inc., to transport more than 1,200 shipments since December 1966. Your service has been excellent in every respect. In fact, the Department of Defense has found American Farm Lines' service to be fast, efficient, responsive, and economical. Under the circumstances, the Department of Defense is desirous of being able to continue to use the services of American Farm Lines. In many instances the Department of Defense receives direct through service from American Farm Lines, Inc. which is desirable. In other words, the Department of Defense would like to retain this transportation source which has been available to it. However, the Department of Defense is not in a position to state

that there would be insufficient or inadequate service without American Farm Lines.

Should an oral hearing be held on your application, the Department of Defense will present an authorized and qualified witness to testify to the above facts.

Sincerely yours,

CURTIS L. WAGNER, JR.
Chief, Regulatory Law Division

Mr. Wagner/svm/30 Apr 68

APPENDIX C

DEPARTMENT OF THE ARMY

Headquarters
Military Traffic Management and Terminal Service
Washington, D.C. 20315

10 May 1969

Mr. Bill D. Gardner
Riss & Company, Inc.
903 Grand Avenue
Kansas City, Missouri 64106

Dear Mr. Gardner:

This is in reply to your letter of 30 April 1968 concerning American Farm Lines proposed application to the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity.

The position of the Department of Defense (DoD) in this matter is outlined for your information. The Department of Defense has utilized the transportation services of farm cooperatives in the movement of military traffic since the latter part of 1966, and such services have been satisfactory, fast, and economical. Consequently, the DoD would like to retain this transportation source. However, the DoD is not in a position to state that there would be insufficient or inadequate service without American Farm Lines.

The American Farm Lines was advised of the above position in a letter from the Office of The Judge Advocate General, Department of the Army, dated 30 April 1968.

It is hoped that this will clarify any misunderstandings which may exist with respect to the DoD's position in this matter.

Sincerely yours,

WOODROW W. ATKINS
Colonel, JAGC
Staff Judge Advocate

(7874-1)